SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari 1

The Record:

Order: Cause agreed and submitted 5
Opinion 7
Judgment 14
Petition for Rehearing 14
Order Denying Petition for Rehearing 16
Clerk's certificate 17

BRIEF OF APPELLANT:

Statement of Case 18
Assignment of Errors 20
Evidence 22
A. Conspiracy—error in admission of certain hearsay testimony against petitioner over his timely and repeated objections 27
B. Judgment of conviction of appellant on hearsay testimony without independent evidence supporting or justifying the introduction of hearsay testimony 30
C. Judgment of conviction of appellant on the charge of conspiracy where the defendant was subject to and could have been tried upon the substantive charge, without involving conspiracy 31
D. Judgment and conviction based upon evidence involving matters not in furtherance of the object or existence of the conspiracy 33
E. Conflict of decisions of the Court of Appeals, Tenth Circuit 34

AUTHORITIES.

Bartlett v. *United States*, 166 F. 2d, 920 34
Krulewitch v. *United States*, 336 U. S. 440 ... 29, 31, 32
Minner v. *United States*, 57 F. 2d 506 27
Thomas v. *United States*, 57 F. 2d 1039 27
United States Code, Title 28, Section 347 18
United States Code, Title 26, sections 3256, 2860, 2857 and 283[illegible] 18
Wilder v. *United States*, 102 F. 2d 177 33

IN THE SUPREME COURT OF THE UNITED STATES

No.————————

EDDIE J. BRIGGS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT OF THE UNITED STATES OF AMERICA.

To the Honorable the Supreme Court of the United States.

The Petition of Eddie J. Briggs, Appellant, respectfully prays for a Writ of Certiorari to the Court of Appeals for the Tenth Circuit to review the decision of said court rendered on the 26th day of July, 1949.

The opinion sought to be reviewed is Eddie J. Briggs, Appellant, *vs.* United States of America, Appellee, Number 3888 of the record of said Tenth Circuit, in the record herein page 7, *et seq.*

This Court has jurisdiction to review said decision under Section 240 of the Judicial Code, 28 United States Code, Section 347.

The statutes involved are:

Section 3253, Title 26, United States Code.
Section 2860, Title 26, United States Code.
Section 2857, Title 26, United States Code.
Section 2831, Title 26, United States Code.

The case has arisen by an indictment returned and filed in the United States Court for the Eastern District of Oklahoma, charging the Appellant, Eddie J. Briggs, with conspiracy in that the said Eddie J. Briggs, Fred Payne, Guy Payne, Velta Peters, Gene Andrews and Harley Greenwood were guilty of conspiring, confederating, combining and agreeing together to commit offenses against the laws of the United States in respect to the payment of special taxes to the Collector of Internal Revenue as required by Section 3253 of Title 26, United States Code, and Section 2860, Title 26, United States Code, and Section 2857 of Title 26, United States Code, and Section 2831, of Title 26, United States Code, which sections provide in substance for the payment of taxes to the Collector of Internal Revenue, complying with the duties of distribution under the wholesale liquor laws, the keeping of records of all transactions thereof, and posting of a sign stating "Wholesale Liquor Dealer". On the trial of this conspiracy case in the United States Court for the Eastern District of Oklahoma a verdict of not guilty was returned against the Defendants, Velta Peters, Guy Payne, and Gene Andrews. The Defendant, Harley Greenwood, was convicted and assessed a fine of $500.00, which was paid without appeal. The Defendant, Fred Payne, was convicted, appealed to the Court of Appeals for the Tenth Circuit and said conviction was affirmed, and the said Defendant, Fred Payne, is not a party to this appeal. Under Title 28, Section 347, United States Code (Judicial Code Section 240 Amended) this Court has jurisdiction to require by certiorari that the cause be certified for determination by this Court.

The questions which are presented for the Supreme Court's consideration are:

A. Conspiracy—error in admission of certain hearsay testimony against Petitioner over his timely and repeated objections.

B. Judgment of conviction of Appellant on hearsay testimony without independent evidence supporting or justifying the introduction of hearsay testimony.

C. Judgment of conviction of Appellant on the charge of conspiracy where the Defendant was subject to and could have been tried upon the substantive charge without involving conspiracy.

D. Judgment and conviction based upon evidence involving matters not in furtherance of the object or existence of the conspiracy.

(a) Evidence involving the violation of the laws of the State of Oklahoma.

(b) Evidence of matters showing violation of Federal Laws over and beyond the duty and jurisdiction of the Appellant.

(c) Instructions of the Court during the trial of said cause on hearsay testimony, which made it impossible for the jury to determine the application of the evidence in said cause.

E. That the decisions of the Court of Appeals for the Tenth Circuit are in conflict as to the application of the rules of evidence defining what constitutes independent evidence to justify the reception of hearsay testimony as is shown in the case of *Bartlett* v. *United States,* 166 Federal 2d 920, on the one hand, and *Minner* v. *United States,* 57 Federal 2d 507, *Thomas* v. *United States,* 57 Federal 2nd 1039, on the other hand. And that the opinion in this case is in conflict with the opinion of the Supreme Court of the United States in the case of *Krulewitch* v. *United States,* 336 U. S. 440.

That these questions are referred to only briefly in this Petition in order to avoid repetition of the same state-

ments and arguments in the following brief of Appellant, made a part hereof.

WHEREFORE, your Appellant prays that a Writ of Certiorari may be issued by this Court.

R. M. MOUNTCASTLE,
Muskogee, Oklahoma,
KELLY BROWN,
Muskogee, Oklahoma,
Attorneys for Petitioner.

VERIFICATION.

STATE OF OKLAHOMA }
} ss.
COUNTY OF MUSKOGEE }

Eddie J. Briggs, being duly sworn upon oath says that he is the Petitioner above named; that he has read the foregoing Petition and that the same is true of his own knowledge except as to matters which are therein stated to be alleged on information and belief and as to those matters he believes it to be true.

EDDIE J. BRIGGS.

Subscribed and sworn to before me this 25th day of August, 1949. Jean Champlin, Notary Public. [Seal]. My commission expires Feb. 11, 1950.

No.

IN THE SUPREME COURT OF THE UNITED STATES

TERM 19

EDDIE J. BRIGGS, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

INDEX.

PAGE

Proceedings in the United States Court of Appeals.

Order: Cause argued and submitted..... 1

Opinion..... 2

Judgment..... 10

Petition for rehearing..... 11

Order denying petition for rehearing..... 14

Clerk's certificate..... 15

Pleas and proceedings in the United States Court of Appeals for the Tenth Circuit, at the May Term, 1949, of said Court, before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

On the 11th day of April, A. D., 1949, a transcript of the record, pursuant to a notice of appeal, filed in the United States District Court for the Eastern District of Oklahoma, was filed in the office of the clerk of the United States Court of Appeals for the Tenth Circuit, in a certain cause wherein Eddie J. Briggs was appellant, and United States of America was appellee, which said transcript, as prepared under the rules of the United States Court of Appeals for the Tenth Circuit, is in the words and figures following:

(The certified transcript of the record has heretofore been transmitted in connection with the petition for a writ of certiorari, Fred Payne v. United States of America, C. A. 10, No. 3889).

And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Tenth Circuit:

Order: Cause Argued and Submitted.

Sixteenth Day, May Term, Thursday, June 2nd, A. D. 1949. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard, Kelly Brown, Esquire, and R. M. Mountcastle, Esquire, appearing for appellant, Eddie J. Briggs; A. Camp Bonds, Esquire, appearing for appellant, Fred Payne; Cleon A. Summers, Esquire, and Paul Gotcher, Esquire, appearing for appellee.

On motion, appellee was granted leave to file typewritten copies of a supplemental brief herein within ten days from this day.

Thereupon these causes were argued by counsel and were submitted to the court.

OPINION.

[July 26, 1949.]

R. M. Mountcastle and Kelly Brown for Appellant Briggs, and A. Camp Bonds and John W. Porter, Jr. (John W. Porter, Sr. and W. R. Banker were with them on the brief) for Appellant Payne.

Cleon A. Summers, United States Attorney, and Paul Gotcher, Asst. United States Attorney for the United States.

Before PHILLIPS, Chief Judge, and HUXMAN and MURRAH, Circuit Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

Eddie J. Briggs, Sheriff of Muskogee County, Oklahoma, and Fred Payne, a Muskogee County liquor dealer, were convicted by a jury verdict, and sentenced by the District Court for the Eastern District of Oklahoma, on an indictment charging that they and other named persons (not convicted), conspired to violate the internal revenue laws of the United States, by carrying on the business of a wholesale liquor dealer without paying the special taxes required by 26 U. S. C. A. Int. Rev. Code, Sec. 3253; purchasing and receiving distilled spirits in quantities greater than twenty gallons from persons other than authorized dealers of distilled spirits in violation of 26 U. S. C. A. Int. Rev. Code, Sec. 2860; wilfully failing and refusing to keep records of such business in violation of 26 U. S.

C. A. Int. Rev. Code, Sec. 2857; and failing and refusing to keep conspicuously on the outside of the place of such business a sign stating that they were "wholesale liquor dealers" in violation of 26 U. S. C. A. Int. Rev. Code, Sec. 2831. Twenty overt acts were pleaded in furtherance of the conspiracy.

Payne separately appeals from a conviction and sentence on the substantive offenses charged as objects of the conspiracy. On appeal, both attack the legal sufficiency of the indictment, but it is patterned upon the indictment approved by this Court in Young v. United States, 168 F. 2d 242.

To establish the conspiracy, the government introduced evidence that in December 1946, after Briggs had been elected sheriff, and before he took office, he went to the home of Dewey Stokes, a retail liquor dealer, and asked him if he wanted to wholesale liquor in Muskogee County. Upon being told that he wished to remain a retail dealer, Briggs told Stokes that he was going to have a wholesale liquor man, and inquired of the usual pay-off to the sheriff.

Prior to 1946, Fred Payne was a small retail liquor dealer in the City of Muskogee. In December of that year, and before the Sheriff took office the following January, he moved just outside the city limits and established a large wholesale place about 200 feet from the side of the road. It is undisputed that during the period laid in the conspiracy, Payne purchased about 7624 cases of whisky, with a value of $319,110.00, and that he made frequent sales in wholesale lots. The evidence shows that he freely represented to retail dealers that if they bought their whisky from him at $5.00 per case in excess of the established price, he would pay their fines and replace their whisky if raided and charged. There was evidence from which the jury was entitled to infer that if a retail dealer pur-

chased whisky from Payne, he was not molested by the county, but if he failed to do so, he was immediately raided.

On one occasion, when a retail dealer had been consistently raided, he went to the sheriff and inquired whether he wanted him to quit. When he said that he did, he asked the sheriff if there was anything he could do, and the sheriff told him to "look around". He contacted Greenwood, a former deputy sheriff, who told him that he could operate if he gave $5.00 per case to the sheriff, and that if he did operate, Greenwood would be the bookkeeper so that the sheriff would not be cheated. Another retail dealer testified that Payne told him that if he wanted to sell whisky, he would have to buy it from him at $14.50 a lug wholesale. When he told Payne that he could not make any money at that price, Payne said "You will make as much money as I do; I have to give the man a thousand dollars a month", and that so long as he bought whisky from Payne, he was never raided by the sheriff or his deputies.

Dewey Stokes testified that soon after taking office, Briggs advised him that if he had any whisky on his place, he had better get it out, and that soon thereafter, Payne and a constable seized his whisky and delivered part of it to the county jail. He went to the jail and surrendered, and requested permission to examine and count his whisky which had been seized and delivered to the jail. While acting under the pretense of counting the whisky, he made a chalk mark on the bottles without letting anyone know. Later, he and two soldiers went to Payne's place and bought two bottles of Seagram's 7-Crown whisky, bearing the marks he had placed upon them in the jail.

While Payne was serving a thirty day jail sentence for violating the state prohibition laws under mandate of the Criminal Court of Appeals, he was often seen at his wholesale establishment. On one occasion, Briggs called Stokes,

told him that he had Payne "behind the steel", and asked him to come down to the jail for a cup of coffee and see Payne in jail. When Stokes arrived, he was admitted to the jail, the sheriff had gone, and Payne was released and permitted to beat him up.

Another witness testified that in May 1947, Greenwood asked the witness to come to his home. Upon his arrival there, he found the sheriff, who asked him if he had been noticing editorials in the newspaper. When he said that he had, the sheriff replied, "that newspaper is putting the heat on us all * * * we are going to have to get rid of that newspaper man before we can make any money", and wanted to know if he could do it or import someone. Briggs asked the witness if John Louis Stone, the newspaper editor, ever came out to his place, and when informed that he did, asked if he ever drank anything. When the witness replied that he came out once in a while, the sheriff said, "will you give me a ring when he comes out. I want to arrest him and take care of him myself, and make it appear that he resisted arrest".

The existence of a conspiracy need not be established by direct evidence, but proof of circumstances from which the existence of a conspiracy may fairly be inferred is sufficient. Bartlett v. United States, 166 F. 2d 920. The evidence was amply sufficient to support the verdict of the jury that a conspiracy existed between the sheriff and Payne to engage in the wholesale liquor business, and it is undisputed that they failed to pay the tax, keep the records, or post the notices.

Briggs complains of the admission of numerous hear say statements made to and by co-conspirators out of his presence, and to which he was not a party. It is of course a rule, scrupulously observed in the federal courts, that hearsay statements made outside the presence of an al-

leged conspirator before the conspiracy is established, are not admissible to incriminate him. Only hearsay statements made in furtherance of a conspiracy which has been established by competent evidence is admissible against an alleged conspirator. Bartlett v. United States, supra; Krulewitch v. United States, 336 U. S. 440. But the order of proof is a matter wholly within the discretion of the trial court. Bartlett v. United States, supra.

The trial court was careful to admonish the jury from time to time during the trial that testimony concerning conversations to which the sheriff, or any other defendant, was not a party, was inadmissible, and should not be considered until and unless the alleged conspiracy was established, and that he would advise them concerning the competency of the evidence against the various defendants. In his final instructions to the jury, the court specifically stated that numerous witnesses had testified to conversations had with some of the defendants, and that in each instance, such conversations were had with only one of the defendants. He pointedly called attention to the witnesses who related conversations with the defendants Payne, Briggs, Greenwood and Andrews, and then admonished them that the existence of a conspiracy could not be established against an alleged conspirator by evidence of acts or declarations of others in his absence. And he went on to explain how that statements made by one, or to one of the defendants was not admissible against others until and unless by competent evidence the conspiracy was established, and the particular conspirator was connected with it.

Quite apart from any statements made by any witnesses outside of the presence of either Briggs or Payne, evidence of his own statements, when coupled with the undisputed fact that Payne operated a very large wholesale establishment on the roadside, openly and notoriously, unmolested

by any law enforcement officers, is entirely sufficient to establish a prima facie conspiracy between the sheriff and the liquor dealers. The jury was entitled to infer from these monumental facts that no one could so flagrantly violate the law without the knowledge, consent and protection of the law enforcement officers, of which the sheriff was the head. The statements of the co-conspirators were only confirmatory of an arrangement manifest to the eyes of all who would see.

We think the evidence was competent, and that the instructions of the court were in accordance with the recent pronouncements of this court in Bartlett v. United States, 166 F. 2d 928. Indeed, the defendants took no exceptions to them, and they were not reversibly erroneous.

Payne, on behalf of himself, complains of the refusal of the court to sustain a motion to suppress the evidence obtained at the time of his arrest. The contention is that since the investigator was present when others purchased liquor in wholesale quantities, some time prior to the arrest, this in some way amounted to a search, or was in effect the inception of the search, which culminated when he was arrested. The record shows that the search and arrest were made on the authority of a search warrant duly issued by the United States Commissioner, upon the affidavit of a special investigator of the Alcohol Tax Unit. The sufficiency of this affidavit or warrant is not questioned, and there is no merit to the contention.

Payne also complains of the introduction of bank records, obtained by the Alcohol Tax Unit, in pursuance of an investigation conducted by an agent on the question of his civil liability for taxes. He moved to suppress these exhibits on the grounds that not having been secured in pursuance of a valid search warrant, they were inadmissible as evidence against him. The exhibits were produced in pur-

suance of a summons issued under 26 U. S. C. A., Sections 3614(a) and 3615. Their production was clearly lawful. United States v. First National Bank of Mobile, 67 F. Supp. 616. If the bank had been subpoenaed duces tecum to produce the records, they would have been admissible, and since they were already available to the government, they were admissible here.

Payne also complains of the refusal of the court to declare a mistrial because of statements made by the United States Attorney on voir dire to the effect that Payne was a convicted bootlegger. It is said that these statements put Payne's character in issue and were therefore prejudicial. But the statements, when considered in their context, were not improper. They were not made for the purpose of putting his character in issue, but as a part of the facts which were later proven, to the effect that Payne was serving a thirty day sentence in the county jail under a mandate of the Criminal Court of Appeals when he assaulted witness Stokes, and also as a part of the proof that while he was serving this sentence, he was frequently seen at his wholesale establishment. Evidence directly bearing upon the guilt of the crime charged is not rendered inadmissible simply because of its possible effect upon the character of the defendant. See Smith v. United States, 173 F. 2d 181.

Payne also complains of the rejection of proffered exhibits showing that certain other named individuals purchased liquor from wholesale liquor dealers in Louisiana and Illinois. The stated purpose of this evidence was to "offset any impression which the jury might have that said plaintiff was the only person engaged in the sale of large quantities of whisky in Muskogee County".

We think the court properly rejected the evidence for the reason that it would not tend to disprove that Payne

was engaged in the wholesale liquor business or that Sheriff Briggs was in league with him.

From an examination of the whole record, we are convinced that the judgments should be affirmed.

JUDGMENT.

Fifty-first Day, May Term, Tuesday, July 26th, A. D. 1949. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

PETITION FOR REHEARING OF APPELLANT, EDDIE J. BRIGGS.

Comes now the Appellant, Eddie J. Briggs, and respectfully requests that this Honorable Court withdraw its opinion filed herein on the 26th day of July, 1949, affirming the judgment of the United States District Court for the Eastern District of Oklahoma, and grant this appellant a rehearing, and for grounds for his Petition for Rehearing appellant says:

I.

That the Court in said opinion has overlooked and not given effect to certain controlling decisions of this Court and of the Supreme Court of the United States

hereinafter cited, which, although called to the attention of this Court, have either been overlooked or not given consideration.

II.

That this Court in the application of the evidence refers to certain testimony, which, in the opinion of this appellant, is not controlling and is not relative to the issue of conspiracy, and in the application of this evidence the appellant feels the Court has failed to establish any independent evidence to justify the introduction of the great mass of hearsay testimony otherwise introduced.

III.

That the opinion of this Court refers to the introduction of certain hearsay testimony, testimony introduced through witnesses relating conversations in the presence of this appellant, and then the opinion recites that this was taken care of by the instructions of the court to the jury withdrawing the same from consideration and leaving it to the jury to decide whether the same should be considered. This statement, in the opinion of the appellant, is in direct contradiction of the opinion of our Supreme Court hereinafter cited.

IV.

That this Court cited the opinion of *Krulewitch* v. *United States,* 336 U. S. 440 in support of one statement of the court by failing to take into consideration the value of said opinion as to the important showing in this case, to-wit, the danger of permitting the evidence to be heard by the jury and the inability of the trial court to withdraw the same from consideration.

And the Court likewise failed to give consideration to the opinion of the Supreme Court of *Arthur Terminiello*

v. *The City of Chicago,* No. 272, October Term, 1948, as to the necessity of exceptions to the instructions of the Court.

Wherefore, your Appellant, Eddie J. Briggs, prays for a rehearing of said cause and that said opinion formerly entered be withdrawn and further consideration given to this cause.

KELLY BROWN,
Muskogee, Oklahoma,

R. M. MOUNTCASTLE,
Muskogee, Oklahoma,

Attorneys for Appellant, Eddie J. Briggs.

FILED United States Court of Appeals, Tenth Circuit, Aug. 16, 1949. Robert B. Cartwright, Clerk.

ORDER DENYING PETITION FOR REHEARING.

Sixty-eighth Day, May Term, Friday, August 26th, A. D. 1949. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on petition for rehearing and was submitted to the court.

On consideration whereof, it is now here ordered that said petition for rehearing be and the same is hereby denied.

CLERK'S CERTIFICATE.

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the transcript of the record from the United States District Court for the Eastern District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Court of Appeals for the Tenth Circuit in a certain cause in said United States Court of Appeals, No. 3888, wherein Eddie J. Briggs was appellant, and United States of America was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 27th day of August, A. D. 1949.

ROBERT B. CARTWRIGHT,
Clerk of the United States Court
of Appeals, Tenth Circuit.

[SEAL]

By GEORGE A. PEASE,
Chief Deputy Clerk.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

Under Title 28, United States Code, Section 347, this Court has jurisdiction to review the decisions of the Court of Appeals for the Tenth Circuit. This cause, and all the questions involved in connection with it are analogous to the case of *Krulewitch* v. *United States,* 336 U. S. 440. The statutes involved, and in our Petition hereinbefore set out, are the revenue statutes, Title 26, sections 3256, 2860, 2857 and 2831.

Stated briefly, but including the substance of the case, it is shown by the record that this Appellant was charged in the United States Court for the Eastern District of Oklahoma, under Indictment, with the crime of conspiracy. Included in the Indictment with this Appellant were Fred Payne, Guy Payne, Velta Peters, Gene Andrews and Harley Greenwood. The case has been disposed of as to all of the other Defendants except this Appellant, Eddie J. Briggs. The Appellant had been elected County Commissioner of Muskogee County for two terms preceding his election as sheriff, and matters complained of herein are alleged to have occurred during his first term as sheriff and since that time he has been elected to and is now holding the office of Sheriff of Muskogee County for his second term. The evidence showed to the satisfaction of the trial court that Fred Payne was an extensive dealer in the liquor business. That during the period covered by the conspiracy he and his associates had brought from neighboring states approximately $320,000.00 worth of liquor and that the same had been distributed either by

wholesale or retail throughout the counties included in the area surrounding the City of Muskogee, and that in carrying on said traffic he had violated the statutes referred to in his failure to comply with the regulations of the Internal Revenue laws providing for the payment of taxes, making of reports, and posting of notice at his place of business. During these transactions the Defendant, Fred Payne, had been arrested by the Appellant, Eddie J. Briggs, and brought into court where conviction was had on ten (10) different occasions and had been raided fifteen (15) times. The fact that he continued to operate, notwithstanding these efforts on the part of the Sheriff to enforce the law, and the amount of liquor he was shown to have handled, were used as overpowering bits of evidence for the conviction of all the parties joined in the conspiracy. Notwithstanding this violation, as shown by the Government's testimony, the Appellant Briggs, has made a record of the most extensive and successful prosecution and convictions for the violation of this law of any preceding officer in the history of our State, and had requested of the County Commissioners and other authorities having charge of the revenue of Muskogee County additional aid in the employment of deputies for enforcement of this law. Yet the impossibility of one hundred percent enforcement, when surrounded by all the other states of the Union where the prohibition law did not prevail, made it impossible either to make a perfect record, or a One Hundred Percent enforcement. However, with all of the evidence shown by the Government as to the introduction of liquor in this area the sales showed less than $2.00 per capita for the area, whereas our national record approximates $66.66 per capita per annum (Dept. of Commerce report of June 12, 1948). This Appellant, with all of his record for law enforcement and reputation as an officer rendering more

efficient service than any previous record shown, was placed on trial, sitting side by side with the man having a reputation of being the worst offender against this law of any other man in the State. In that position he was required to face all of the evidence that would be brought to bear upon this subject irrespective of his connection with the matters involved. The jury heard this testimony. The trial court in an effort to place the burden where it belonged attempted to instruct the jury as to what evidence was applicable, but neither the court nor the jury could possibly separate the competent evidence from the incompetent and the matters heard could not be erased. Therefore, the conviction.

ASSIGNMENT OF ERRORS.

A. Conspiracy—error in admission of certain hearsay testimony against Petitioner over his timely and repeated objections.

B. Judgment of conviction of Appellant on hearsay testimony without independent evidence supporting or justifying the introduction of hearsay testimony.

C. Judgment of conviction of Appellant on the charge of conspiracy where the Defendant was subject to and could have been tried upon the substantive charge without involving conspiracy.

D. Judgment and conviction based upon evidence involving matters not in furtherance of the object or existence of the conspiracy.

(a) Evidence involving the violation of the laws of the State of Oklahoma.

(b) Evidence of matters showing violation of Federal Laws over and beyond the duty and jurisdiction of the Appellant.

(c) Instructions of the court during the trial of said cause on hearsay testimony, which made it impossible for the jury to determine the application of the evidence in said cause.

E. That the decisions of the Court of Appeals for the Tenth Circuit are in conflict as to the application of the rules of evidence defining what constitutes independent evidence to justify the reception of hearsay testimony as is shown in the case of *Bartlett* v. *United States*, 166 Federal 2d 920, on the one hand, and *Minner* v. *United States*, 57 Federal 2d 507, and *Thomas* v. *United States*, 57 Federal 2nd 1039, on the other hand. And that the opinion in this case is in conflict with the opinion of the Supreme Court of the United States in the case of *Krulewitch* v. *United States*, 336 U. S. 440.

Assignment of errors are set out in the appeal from the District Court to the Circuit Court and are shown in the record herein. The substance of the same was incorporated in our Assignments in our Petition for Rehearing before the Court of Appeals, and for convenience are restated above as to the substance thereof. We feel that the assignments shown in our preceding Petition cover in substance assignments made on our appeal from the District Court and our Petition for Rehearing before the Court of Appeals, and we are not attempting to vary from the subject matter, although some divisions of the argument have been eliminated in an attempt to state it more direct and concise as directed by the rules of this court.

EVIDENCE.

Throughout the trial witnesses were used by all parties in the number of seventy (70). The Government used the witnesses J. B. Wenger (R. 148), Pinkus G. Gardsbane (R. 165), H. J. Brown (R. 210), and Hyman Rubin (R. 222), who were connected with wholesale liquor houses in Cairo, Illinois, and the State of Louisiana, showing invoices of liquor sold for shipment into Oklahoma. A Stipulation has been filed (R. 816) reducing this testimony to statements giving the amount of shipments, dates and names of parties receiving same, which in the opinion of both parties, avoids consideration of these large numbers of invoices in detail. Therefore, the evidence of these witnesses appears to us to be unnecessary for further statement of record, with the exception of a legal question hereinafter mentioned. The testimony of the witnesses J. B. Slaight (R. 191) and Arthur R. Franklin (R. 196) is with reference to evidence pertaining to another defendant and on matters in which this appellant is not interested. The witnesses Barton Cox (R. 224), Fred Desmond (R. 236), John Baxter (R. 276), Harry Davenport (R. 285), gave their versions of hauling liquor from the above named establishments to parties in Oklahoma. Except for certain parts of their testimony which were objected to as being improperly admitted, and which are specifically referred to hereinafter, this testimony appears immaterial as to the conspiracy charges involved.

The witnesses Harold Smith (R. 306) and Bill Kelly (R. 311) and R. H. Weesner (R. 311), are used for the identification of records.

The witnesses C. Peel Bannister (R. 317), Benjamin J. Kepler (R. 324) and Maurice E. Craig (R. 334) are used for the identification of documents in connection with the

Alcohol Tax Unit and these matters refer to other defendants in this case.

The witnesses Jewell Lomon (R. 336), Ardyce Buse (R. 341), and Bill Kelly are used for identification of court records, which are purely formal.

The testimony of the witnesses, Dewey Stokes (R. 401), Frank Beck (R. 482), and Dave Nichols (R. 522), are witnesses giving testimony material to the statement of points involved in this case and their testimony will be analyzed to such an extent as we think will bring before this Court the points involved. Of the other witnesses used by the Government, we do not deem it necessary to develop their testimony. And the witnesses used by the defense, a large number of them character witnesses, first on the impeachment of certain Government witnesses, and then on the good character of the defendants, are produced for matters that were purely contradictory of the Government's testimony and we do not consider this testimony material for this consideration. In order to make the testimony of these witnesses readily available to the Court, in the event the same should be desirable, other than the quotations we give, we are following this with a detailed reference to the record following the names of each witness:

		RECORD PAGE
1.	J. B. Wenger	148-164
2.	Pinkus G. Gardsbane	165-191
3.	J. B. Slaight	191-196
4.	Arthur R. Franklin	196-204
5.	Pinkus G. Gardsbane	204-210
6.	H. J. Brown	210-222
7.	Hyman Rubin	222-224
8.	Barton Cox	224-236
9.	Fred W. Desmond	236-247
10.	Elmer Oakley	248-275

11.	John Baxter, Jr.	276-285
12.	Harry D. Davenport	285-306
13.	Harold Smith	306-311
14.	Bill Kelly	311
15.	R. H. Weesner	311-317
16.	C. Peel Bannister	317-323
17.	Benjamin J. Kepler	324-334
18.	Maurice E. Craig	334-336
19.	Jewell Lomon	336-341
20.	Ardyce Buse	341-352
21.	Bill Kelly	353-364
22.	Arthur R. Franklin	365-400
23.	Dewey Stokes	401-440
24.	Bobbie Burris	440-457
25.	Charles Lubbes	457-482
26.	Frank Beck	482-496
27.	Edgar Turney	496-501
28.	R. E. Davis	501-505
29.	Bill Norton	505-511
30.	Harley Huggins	511-513
31.	Jim Cooper	514-516
32.	Connie W. Burris	517-518
33.	Sonny Barnett	518-522
34.	Dave Nichols	522-528
35.	Bobbie Burris	528-535
36.	Eddie J. Briggs	535-583
37.	Oscar Hutchins	583-589
38.	Mrs. Jesse Perry	589-592
39.	John Henry Campbell	592-595
40.	Fred Cooper	595-596
41.	Arley Whinnery	596-598
42.	Walter Hamblin	599
43.	Claude Pierce	600-601
44.	Sewell Everet	601-603
45	Grover Bishop	603-605
46	Rennie Rector	605-611
47.	Jay Crossland	612-618
48.	Rennie Rector (Recalled)	618-619
49.	J. Ollie Lee	620-621
50.	F. J. Purcell	621-622

51.	Ollie Pruitt	622-623
52.	Mrs. Willie Loftis	624-625
53.	O. B. Martin	625-626
54.	Ardyce Buse	627-634
55.	Bill Belly	635-637
56.	Harley Greenwood	638-658
57.	Rollo Fewell	659-660
58.	C. L. Carter	660-662
59.	T. Bowlin	662-663
60.	Gene Andrews	664-686
61.	Pauline Chastain	686-694
62.	Paul Halfast	698-699
63.	Robert E. Edmonds	700-703
64.	Jack Critchlow	704-705
65.	Perry Shuttee	705-706
66.	Richard Harnage	707-708
67.	Mrs. S. L. Baker	708-709
68.	Thomas C. Devilbliss	711-712
69.	Guy Payne	712-733
70.	Arthur R. Franklin (Recalled)	733-735

The witness Dewey Stokes testified that he had a conversation with the defendant, Eddie Briggs, in which that defendant made inquiry as to whether he, Stokes, wished to carry on the wholesale liquor business in Muskogee and that in answer to this question Stokes advised him that he cared to carry on only the retail liquor business. That the defendant then asked Dewey Stokes what the payoff was in Muskogee. This witness also testified that he lost some liquor in a raid by a constable of Muskogee County. That he later thought he identified this liquor down at the County Jail in the sheriff's possession and that he marked this liquor so as to identify the same and later he testified that a soldier boy came to his place and on failing to get any liquor there, he went to the establishment operated by Slim Payne and bought a pint of liquor which showed the mark indicating the same as his identifying mark in the County Jail. And this witness testified

that he had difficulty at the County Jail with Slim Payne. Payne beat him up.

The witness Frank Beck (R. 482) testified that he had a conversation with the defendant Eddie Briggs in which the question of a transport truck containing liquor could be parked at a certain designated place and not be interfered with and this witness testified that he talked about paying Eddie Briggs $100.00 per week for the parking of the truck and presumed protection, but never paid any money.

The witness Dave Nichols (R. 522) testified that he had a conversation at the home of Harley Greenwood with this defendant, Harley Greenwood and himself present and that in the course of this conversation, the defendant Eddie Briggs made inquiry and offered suggestions about the disposition of a newspaper writer in Muskogee, in order to stop the publicity that was being given.

A. Conspiracy—error in admission of certain hearsay testimony against petitioner over his timely and repeated objections.

At the time of the trial of this case the decisions of the Tenth Circuit in the case of *Minner* v. *United States*, 57 Federal 2nd 506, and *Thomas* v. *United States*, 57 Federal 2nd 1039, were considered as controlling cases. In the *Minner* case the syllabi of the court pertinent to this matter are as follows:

> "Par. 9. To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established (citing cases).
>
> "Par. 10. Declarations of one conspirator to another are not competent evidence to establish the connection of a third person with the conspiracy (Citing cases).
>
> "Par. 11. The existence of a conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators, done or made in his absence" (Citing cases).

The Court further says:

> "Acts and declarations of a conspirator to be admissible against his co-conspirators must occur during the existence of the conspiracy and must be in furtherance of its objects."

The *Thomas* case closely follows this and is fully supported by other opinions of the Tenth Circuit.

With this statement of the law consider the proceedings of the trial court in the introduction of evidence, page 257-260 of the record:

> "The Court: Now, gentlemen, I will sustain the objection made by Mr. Brown and Mr. Wilcoxen as to

their clients at this time. But I will overrule it as to Mr. Payne, and will now say to the jury we have reached a point in the case, as I indicated to you heretofore we might, and that is when certain evidence is properly considered against some of the defendants and not as against the others. *Now this is a statement that is being made by one of the defendants and it may concern another defendant but unless there is some additional evidence introduced later on that makes it competent you will disregard it. And I will tell you if additional evidence is introduced. So you will bear that in mind.*" (Italics ours.)

And on page 382, following an objection made to the introduction of evidence of this nature, the court said:

"The Court (Addressing the U. S. Attorney): That has been constantly occurring and I am going to have to take care of it after the evidence is all in. At this time it may only be admissible as against Fred Payne. *I will have to advise the jury after it is all in the effect of it. I can't keep up with what I do sustain and what I overrule as we go along through the trial. A lot of this is not admissible on some of the theories you are talking about, but it is admissible as against Mr. Payne clearly at this time.*" (Italics ours.)

Under this procedue and this process of reasoning the evidence was introduced, not only the particular evidence above mentioned, but a great mass of evidence including the introduction of what was considered a large amount of liquor as a background, and then the statement of various witnesses which the Government said would be made competent by the further offers of the Government connecting the same. It is our contention that the evidence of direct nature connecting this Appellant with the crime in any way was never introduced. Now consider the effect of this upon the jury as to whether it would be possible

under the most careful instructions of the jury for a separation to be made. We think it was utterly impossible. We think the conspiracy, affecting this Appellant, was so involved that it was beyond any human possibility to prove the Appellant guilty by competent testimony. Hearsay testimony was admitted without doubt. Could the effect of this be removed by any instructions that the court might give? We did not have available at that time the opinion of this Court in *Krulewitch* v. *United States,* 336 U. S. 440, handed down by this Court on March 28, 1949. The concluding sentence of the opinion delivered by the court in that case is as follows:

> "We cannot say that the erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioner."

The concurring opinion written by Justice JACKSON has the following paragraph stating the truth which cannot be denied:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal* v. *United States,* 332 U. S. 535, 559, all practicing lawyers know to be unmitigated

fiction. See *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 F. 2d 54."

B. Judgment of conviction of appellant on hearsay testimony without independent evidence supporting or justifying the introduction of hearsay testimony.

It is our contention that there was no independent testimony against this appellant justifying the hearing by the jury of the large mass of hearsay evidence. An attempt to supply this was made by the prosecution by the introduction of the evidence of Frank Beck, Record 482-496, Dewey Stokes, Record 401-440, and Dave Nichols, Record 522-528. Note that these three (3) witnesses were produced late in the record of the case. The testimony of Frank Beck had no connection with this conspiracy, was with reference to an unrelated event, and was received as evidence, over objections of the Defendant and then the court attempted to instruct the jury not to consider the same, Record Page 483.

The testimony of the witness, Dewey Stokes, shows that he was not a party to the conspiracy, not one of the Defendants in the case, and related a conversation having no part of the plan alleged to have been carried out. In effect his testimony negatives the conspiracy as attempted to be proved in this case.

The witness, Dave Nichols, testified to what the Government attempted to show as a dramatic situation with reference to a newspaper reporter, and not involving any incident or part of the alleged conspiracy. The Government attempted to justify the introduction of a large mass of this hearsay testimony without having this independent evidence, other than as above attempted. In this connection we again refer to the case of *Minner* v. *United States, supra,* page 511:

> "The acts and declarations of a conspirator to be admissible against his co-conspirators must occur during the existence of the conspiracy and must be in furtherance of its objects. *Brown* v. *United States*, 150 U. S. 93, Lane 1. United States, 34 Fed. (2d) 413, 416."

And Mr. Justice BLACK in *Krulewitch* v. *United States*, *supra*, page 4 of the opinion:

> "This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts."

C. Judgment of conviction of appellant on the charge of conspiracy where the defendant was subject to and could have been tried upon the substantive charge, without involving conspiracy.

If this Appellant was guilty of violating the provisions of the revenue statutes above quoted, made the basis of the charge in the indictment, he was guilty and could have been convicted of the substantive charge in a direct proceeding against him charging that offense. At this place we wish to urge with all sincerity that the prosecution in this case as against this appellant is a most unjust proceeding. A judgment was obtained, finding a man guilty of conspiracy whose previous reputation was unblemished and whose conviction could never have been brought about except by the odious, in this instance, proceeding of conspiracy. There was evidence of wrongdoing by somebody. Everything that any one of these Defendants had done was used against all, including this Appellant. Could he have faced the court independent and free from the association with the admitted criminals with whom he had to sit, the results would have been different. But he sat in the trial surrounded by the very criminals whom he had

prosecuted to the extent that they and all their associates and men of their kind were seeking his conviction. Every man that he had prosecuted so diligently, including the chief offender in this case, was put on the same level with this Appellant. Every enforcement of the law that he had brought about during his term of office was, through the criminals whom he had offended, brought to bear against him in this trial. Therefore, we urge the inequities of this proceeding, perhaps the most palpably clear of any case that has ever been presented where the charge of conspiracy was used as an implement to bring about the result of conviction that never could have been acquired otherwise. All the history of the crime denominated conspiracy is brought to the surface in most unflattering light by the trial of this Appellant in this case. He is bearing the burden of the creation of this odious oppression from the time of its inception in the Hall of Inquisitions down to the modern tenets of the Communist Party. As stated in Intent in Criminal Conspiracy, 89 U. of Pa. L. Rev. 624:

> "In the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy."

Referring again to *Krulewitch* v. *United States, supra,* page 9:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate."

D. Judgment and conviction based upon evidence involving matters not in furtherance of the object or existence of the conspiracy.

That the laws of the State of Oklahoma were being violated under the alleged attempt to enforce prohibition in this lone state of the Union having such a theory, was evident from the beginning. The instructions of the court attempted to enlighten the jury to the extent that this was not an issue in the trial. The opinion of the Tenth Circuit in *Wilder* v. *United States*, 102 Fed. 2nd 177, holds definitely that the violation, even by this Appellant, of a state law is not basis for a conviction on a federal charge of this nature. And on the other hand, the failure of State officers in Oklahoma to enforce the federal prohibition law is not grounds for conviction. Quoting from the *Wilder* case, page 183, *supra*, is the following:

> "That county officers and their deputies do not bear any official duty by virtue of their positions to enforce the Internal Revenue Laws of the United States. And their mere failure to enforce such laws, or to prevent a conspiracy to violate them, without more, is not enough to support a conviction upon a charge of violating Title 18, U. S. C. A. Section 88. It is necessary to prove that they consented in some affirmative way to become a party to the concert of action".

Notwithstanding this definite commitment of all parties to this, the evidence introduced in this case of the violation of State laws was so prevalent as to insure a conviction on a conspiracy charge of this nature. The instructions of the court advising the jurors not to consider this was equivalent to pleading the Defendants guilty to the commission of the crime. This being submitted to the jury, even with the greatest of care, was fatal. Just in the same category there was the admission of hearsay testimony

with instructions of the court to the effect, now that you have heard this, don't you consider it.

E. Conflict of decisions of the Court of Appeals, Tenth Circuit.

We have heretofore mentioned the controlling cases on this question in this Tenth Circuit, the case of *Minner* v. *United States,* and *Thomas* v. *United States, supra,* which are definitely in favor of the arguments made by this Appellant, are apparently in conflict with the decision of the same court as outlined in *Bartlett* v. *United States,* 166 Federal 2nd, 920. It appears that the Circuit Court in writing its opinion on July 26, 1949, sought to favor the case of *Bartlett* v. *United States* as being controlling. We think these cases and the long line of cases on the same subject from the same Circuit, show a definite conflict of authorities on the question. Therefore, it is very imperative that this court at this time in this case should definitely adhere to one side or the other. It is our thought that the court has already done so in the case of *Krulewitch* v. *United States, supra,* which we urge as controlling in this case, but without the application of the judgment of this court to the decision of the Circuit Court, this Appellant bears the burden of the existing situation. We urge for this Appellant in this case, the same rule that the Court made in *Krulewitch* v. *United States* and without that he bears an unjust burden.

Respectfully submitted,

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